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MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES,

COMMUNICATING

(In compliance with a resolution of the Senate)

Copies of correspondence in relation to the interpretation of the tenth article of the treaty between the United States and Great Britain of the 9th of August, 1842.

MARCH 21, 1844.

Read, and ordered to be printed.

To the Senate of the United States :

I transmit to the Senate a report from the Secretary of State, with documents, containing the information requested by their resolution of the 23d ultimo.

JOHN TYLER.

WASHINGTON, March 20, 1844.

DEPARTMENT OF STATE,
Washington, March 19, 1844.

The Secretary of State *ad interim*, to whom has been referred a resolution of the Senate of the 23d ultimo, in which the President is requested, if not inconsistent with his views of the public interest, "to communicate any correspondence which may have taken place, with any agent or agents of the Government of Great Britain, in relation to the interpretation of the tenth article of the treaty between the United States and Great Britain, concluded at Washington the 9th of August, 1842, accompanied by information of any action which may have occurred, in execution of this article, on the part of the authorities of the United States," has the honor to lay before the President the accompanying papers, embracing, in connexion with the documents heretofore transmitted, the correspondence and information called for by the resolution of the Senate above recited.

Respectfully submitted.

JOHN NELSON,
Secretary of State ad interim.

TO THE PRESIDENT OF THE UNITED STATES.

LIST OF PAPERS.

Mr. Fox to Mr. Upshur—24th July, 1843.
 Mr. Upshur to Mr. Fox—25th July, 1843.
 Mr. Nelson to Mr. Upshur—7th August, 1843.
 Mr. Upshur to Mr. Fox—10th August, 1843.
 Mr. Fox to Mr. Upshur—29th September, 1843.
 Mr. Upshur to Mr. Fox—29th September, 1843.
 Same to same—13th October, 1843.
 Mr. Fox to Mr. Upshur—16th October, 1843.
 Mr. Upshur to Mr. Fox—23d October, 1843.
 Mr. Fox to Mr. Upshur—25th October, 1843.
 Same to same—22d November, 1843.
 Same to same—22d November, 1843.
 Mr. Upshur to Mr. Fox—1st December, 1843.
 Mr. Fox to Mr. Upshur—15th December, 1843.
 Mr. Upshur to Mr. Fox—27th December, 1843.
 Mr. Fox to Mr. Upshur—28th December, 1843.
 Mr. Everett to Mr. Upshur, (extracts, with enclosures)—Sept. 14, 1843.
 Same to same, (extracts, with enclosures)—16th October, 1843.
 Same to same, (extract, with enclosure)—1st November, 1843.
 Mr. Upshur to Mr. Everett, (extract)—14th November, 1843.
 Same to same, (extract)—23d November, 1843.
 Mr. Everett to Mr. Upshur, (extract)—2d December, 1843.
 Same to same, (extract, with enclosures)—2d January, 1844.

— — —
Mr. Fox to Mr. Upshur.—[COPY.]

WASHINGTON, July 24, 1843.

SIR : The United States Government will no doubt have been already made acquainted, by the judge of the district court of New York, with the legal proceedings taken before that court in the case of Christina Gilmour, also called Christina Cochran, whose surrender, as a fugitive from justice, is claimed by Her Majesty's Government, from the Government of the United States, under the provisions of the 10th article of the treaty concluded at Washington on the 9th of August, 1842—the said Christina Gilmour, or Cochran, being charged, upon sufficient evidence, with the murder of her husband, John Gilmour, at Inchinnan, in the county of Renfrew, in Scotland.

The warrant for the arrest of this person was promptly granted by the judge of the district court of New York, at the requisition of the British consul in that city.

The evidence of criminality has been duly heard and considered in the district court, according to the rule laid down in the treaty; and copies of that evidence, certified by the judge, will, I conclude, before this time, have been transmitted to the Executive Government at Washington, for its final action in the case. But it is possible that the requisition of the British consul at New York may not be considered sufficient to obtain the final surrender of the prisoner to British authority. I therefore hereby officially request, as Her Majesty's envoy extraordinary and minister plenipoten-

tiary to the United States that the Executive Government of the United States will be pleased to issue the necessary warrant, to deliver up the person of the above-mentioned Christina Gilmour, or Cochran, to George McKay, an officer of the Scotch police, to be by him transported to Scotland for trial—the said George McKay being duly authorized for that purpose by the sheriff of the county of Renfrew.

I avail myself of this occasion to renew to you the assurance of my distinguished consideration.

H. S. FOX.

Hon. ABEL P. UPSHUR, &c.

Mr. Upshur to Mr. Fox.—[COPY.]

DEPARTMENT OF STATE,

Washington, July 25, 1843.

SIR: I have the honor to acknowledge the receipt of your letter of the 24th July, concerning a requisition for the extradition of Christina Gilmour, otherwise called Christina Cochran, under a provision of the late treaty between the United States and England.

Although this is the first case which has arisen, and no particular form of requisition has been agreed on, yet I see no reason to suppose that your official letter will not be, in all respects, sufficient. The subject, however, is now under consideration, in other aspects of it, and some days, say one week, will probably elapse before it will be possible to determine on the proper course of action on the part of this Government. I will lose no time in communicating to you the result.

I avail myself of the occasion to offer you the assurance of my high consideration.

A. P. UPSHUR.

HENRY S. FOX, Esq., &c.

Mr. Nelson to Mr. Upshur.—[COPY.]

ATTORNEY GENERAL'S OFFICE,

August 7, 1843.

SIR: The case of Christina Cochran, alias Gilmour, referred to this office for my opinion, has been examined with the attention due to the magnitude and importance of the interests it involves. The result of my reflections, which I will proceed briefly to state, would have been communicated at an earlier period, but for the desire expressed by the counsel of the accused to be heard in support of her remonstrance—a desire reasonable in itself, and which I felt it to be my duty to gratify. He has accordingly addressed to me a written argument, which I have the honor herewith to submit.

The transcript certified to the President, by Silvanus Rapelje, a commissioner of the circuit court of the United States in the second circuit for the southern district of New York, discloses the following facts:

On the 2d of June, 1843, the district attorney of the United States for the southern district of New York exhibited to the said commissioner the affidavit of George McKay, of Renfrewshire, in Scotland, in the kingdom of Great Britain, made on that day, before the Hon. S. R. Betts, district judge, in which it is alleged that a murder had been committed by the said Christina Gilmour, on her husband, John Gilmour, on or about the 11th day of January, 1843, in the town of Inchinnan, in the parish of Inchinnan and shire of Renfrew, in Scotland; that said accused had fled and absconded from justice; and that the deponent believed her to be then on board of a vessel which sailed from Liverpool on or about the 2d day of May, 1843; and which he expected shortly thereafter to arrive in New York.

Thereupon, on motion of the district attorney, a warrant for the apprehension of said accused was issued by said commissioner, upon which she was arrested and produced before him on the 21st day of June, and on the same day committed for examination.

On the 24th of June, the counsel of the accused interposed, as an objection to any further proceeding by the commissioner, a plea of insanity, which, after a full and impartial investigation, was overruled.

On the 17th of July, the commissioner proceeded to the examination of the witness produced before him to sustain the charge; and, after hearing counsel for the prosecution and the accused, on the 21st of the same month, certified "that, upon hearing the evidence of criminality, in the matter of Christina Cochran, *alias* Gilmour, charged with the crime of murder, in Scotland, and after carefully considering the same, he had decided that, 'according to the laws of the place' where she was found and arrested, sufficient evidence had been adduced to justify her apprehension and commitment for trial."

Contemporaneously with the transmission of the transcript to the Executive, the counsel of the accused filed her petition and remonstrance, denying the validity of the proceeding before the commissioner, and protesting against the issuing of any warrant for her surrender.

On the 24th of July, Mr. Fox, the accredited minister of the British Government, in the name and by the authority of his sovereign, preferred a "request" for the surrender of the said accused to George McKay, an officer of said Government.

The question submitted for my opinion is, whether, under these proceedings and the 10th article of the treaty, "to settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America, for the final suppression of the African slave trade, and for the giving up of criminals, fugitives from justice, in certain cases," concluded and signed at Washington, on the 9th day of August, 1842, it is the duty of the President to issue his warrant for the surrender of the accused.

The terms of the article of the treaty are:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions, by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other, provided that this shall only be done

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upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint, made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitives."

The stipulations of this article refer, first, to the object proposed to be accomplished; secondly, to the character of the evidence; and, thirdly, to the mode and means by which the object is to be effected.

The object is to procure the delivering up to justice, upon mutual requisitions, by the contracting parties, or their ministers, officers, or authorities, respectively made, "*of all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other.*"

The evidence upon the exhibition of which this is to be done is such as, "according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed."

The mode to be pursued is, by complaint to the respective judges or other magistrates of the two Governments, setting out the offence charged to have been committed on oath, which judges or other magistrates are thereupon authorized to issue a warrant for the apprehension of the person accused, and, upon his being brought before them, to hear and consider the evidence of criminality; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive.

Satisfactorily to determine the extent of the obligation imposed on the President by this proceeding, it is proper to consider the nature of the offence charged to have been committed by the accused, the evidence of criminality by which it is sustained, and the regularity of the mode pursued in its investigation.

The offence charged is that of *murder*, alleged to have been committed by the accused upon the body of her husband, in Scotland, within the jurisdiction of Great Britain. She is found in the city and State of New York, within the territories of the United States, and is shown to have fled from the place in which the offence is said to have been committed.

The *casus fœderis* of the treaty has therefore unquestionably occurred; the case stated, if sustained by the evidence, being within the very terms and letter of the 10th article.

Of the sufficiency of the evidence of criminality to sustain the charge, the commissioner before whom the proceeding has been prosecuted has certified his decision. The treaty has invested him, if he be a magistrate of the United States, within its scope and meaning, with the authority to hear and consider and certify it. He deems the evidence sufficient, accord-

ing to the law of the place where the accused was found and arrested, to justify her apprehension and commitment. Behind this judgment I do not think it is the duty or province of the President to look. It is conclusive. And if it were not, the evidence in the transcript, in my judgment, is abundantly sufficient to support it.

The case, therefore, is covered by the provisions of the 10th article of the treaty; and if the President is satisfied of the regularity of the proceedings, which have been certified, and of the authority of the commissioner to entertain them, his duty, plainly indicated by the terms of the convention, is to gratify the demand of the British minister, and to issue a warrant for the surrender of the fugitive.

Had this commissioner, then, under any circumstances, authority to take cognizance of this complaint? In other words, is he a "judge or other magistrate of the United States," within the meaning of the 10th article of the treaty of 1842? If such a judge or magistrate, have his proceedings in this case been such as to justify the action of "the proper Executive authority" thereon?

The office of "commissioner" is created, and the extent of his authority defined, by the acts of Congress of the 20th February, 1812, chapter 25; the 1st March, 1817, chapter 203; and the 23d August, 1842, chapter 188.

The first-mentioned act provides, "that it shall be lawful for the circuit court of the United States, to be holden in any district in which the present provision by law for taking bail and affidavits in civil causes (in cases where such affidavits are by law admissible) is inadequate, or, on account of the extent of such district, inconvenient, to appoint such and so many discreet persons, in different parts of the district, as such court shall deem necessary, to take acknowledgments of bail and affidavits, which acknowledgments and affidavits shall have the like force and effect as if taken before any judge of said court."

By the act of 1817, said commissioners are authorized to take affidavits and bail "in civil causes, to be used in the several district courts of the United States, and shall and may exercise all the powers that a justice or judge of any of the courts of the United States may exercise, by virtue of the 30th section of the act entitled 'An act to establish the judicial courts of the United States.'"

The 30th section of the act of 1789, referred to, provides for the taking of depositions in causes depending in courts of the United States, where the witnesses reside more than one hundred miles from the place of trial, or are bound on a voyage to sea, or are about to go out of the United States, or out of the district, and to a greater distance from the place of trial than one hundred miles, or are ancient or very infirm, and has no applicability to the question under consideration.

The act of 1842 is more important. It provides "that the commissioners who now are, or hereafter may be, appointed by the circuit courts of the United States to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes, shall and may exercise all the powers that any justice of the peace or other magistrate of any of the United States may now exercise in respect to offenders for any crime or offence against the United States, by arresting, imprisoning, or bailing the same, under and by virtue of the 33d section of the act of the 24th September, A. D. 1789, entitled 'An act to establish the judicial courts of the United States,' and who shall and may exercise all the powers that any

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judge or justice of the peace may exercise, under and in virtue of the 6th section of the act passed the 20th July, A. D. 1790, entitled 'An act for the government and regulation of seamen in the merchant service.' "

The 33d section of the act of 1789, thus incorporated into the act of 1842, as far as concerns the question involved in this case, is, "that, for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as, by this act, has cognizance of the offence."

The power of the commissioner under these laws is, to arrest, to imprison, and to bail, for any crime or offence against the United States, and is commensurate with the power residing, for the same purposes, in any judge of the United States. He is thus clearly a magistrate of the United States, invested with authority to perform judicial functions of the deepest and highest import to the well being of society; and if a judge of the United States might rightfully act in enforcing the provisions of the 10th article of the treaty of 1842, a commissioner is equally competent to the exercise of the like authority.

The terms of the treaty are free from all ambiguity. They are: "The respective judges and *other magistrates* of the two Governments shall have power, jurisdiction, and authority, upon complaint made, under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered."

The commissioner, in my judgment, is such *other magistrate*, who may rightfully take cognizance of cases arising under the convention.

It is very manifest, too, that if the design of the parties to these stipulations, in designating the authorities to hear and consider "the evidence of criminality," was to commit the duty to magistrates, who, from the nature of their offices, were best qualified for its intelligent discharge, it could not have been more effectually accomplished than by referring it to a commissioner, whose obligation, under the laws of the United States, is to perform the very function of preliminary examination, with a view to commitment, which is contemplated by the treaty.

The commissioner, then, being "a magistrate," and competent to entertain jurisdiction of the case, have his proceedings therein been in pursuance of the authority with which the treaty has invested him?

The only prerequisite prescribed is, that complaint shall be made, under oath, charging an offence to have been committed within the terms of the treaty and the jurisdiction of the Power making the demand, and that the party alleged to have committed it has fled from justice, and is within the territories of the United States. This gives to the "magistrate" "power, jurisdiction, and authority." Upon such complaint, he is bound "to issue a warrant for the apprehension of the fugitive or the person charged; to hear and consider the evidence of criminality, and to certify to the Executive authority whether, according to the laws of the place where the fugitive or person so charged shall be found, such evidence would justify his apprehension or commitment for trial, if the crime or offence had there been committed."

The certified transcript contains the evidence that this requisite has been complied with, and that the duty consequent upon it has been performed.

The case, then, is within the treaty; sustained by the evidence prescribed by it; acted on by a magistrate having authority to entertain it, upon a complaint duly and regularly made; the proceedings, with the judgment of the magistrate, have been certified to the Executive authority, and the surrender of the fugitive authoritatively demanded. The duty of the President, in my opinion, is, to issue the warrant.

The accused, in her petition and remonstrance, addressed to the President, and which her counsel, in his argument, has endeavored to sustain, has challenged the validity of the proceedings of the commissioner, substantially, upon the grounds following:

1st. That the treaty of Washington, concluded on the 9th of August, 1842, under which the accused has been arrested and committed, has not been made effectual by such prerequisite legislative enactments by Congress as can alone authorize her surrender as a fugitive from justice within the scope of the tenth article.

2d. That, by the Constitution of the United States, the judicial power is declared to be vested in the Supreme Court, and such inferior courts as Congress shall from time to time ordain and establish; that Congress has not ordained and established any court with jurisdiction over cases like this, and especially has not authorized a commissioner to act thus judicially upon the case of the accused; and, moreover, that Congress has no power to vest such authority in such commissioner, but only in a court, properly so called, and constituted as a court of record, whose proceedings may be reviewed by writ of error or of *certiorari*.

3d. That the tenth article of the treaty is itself void, as being repugnant to the Constitution of the United States.

As to the first objection. The convention has been duly concluded and ratified, as well on the part of Great Britain as of the United States. The ratifications have been interchanged and the treaty proclaimed. It has been "made under the authority of the United States," and is the supreme law of the land. It has prescribed, by its own terms, the manner, mode, and authority, in and by which it shall be executed. It has left nothing to be supplied by legislative authority, but has indicated means suitable and efficient for the accomplishment of its objects. It needs no sanctions other or different from those inherent in its own stipulations, and requires no aid from Congress. Surely, it cannot be necessary to invoke the legislative authority to give it validity, by its re-enactment; and to change its terms is within the competency only of the contracting parties by whom it has been executed.

The supremacy of a treaty thus concluded and authenticated reposes upon the authority of the Constitution itself, and is paramount to all mere legislation.

This principle was distinctly asserted by the Executive department of the Government in 1799, in the case of Thomas Nash, *alias* Jonathan Robins, who was surrendered to the British authorities as a fugitive from justice under the treaty of 1794.

The terms of that convention were, moreover, far less comprehensive than are those of the treaty of Washington. They prescribed no mode and designated no officer or class of officers, in which or by whom the evidence of criminality was to be heard and considered. They merely pro-

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vided "that His (British) Majesty and the United States, on mutual requisitions, by them respectively made, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged with murder or forgery committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other; provided that this shall be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had been there committed." To carry these stipulations into effect, no act was passed by Congress. They were enforced by the President by virtue of their own inherent authority, and as an act of Executive power; and his action was affirmed and vindicated by the legislative department of the Government, after a debate conducted with transcendent ability, in which this very ground of the necessity of legislative interposition was assumed—assumed, however, let it be remembered, because of supposed deficiencies in the details of the convention, which had in terms designated no officer to effectuate it; none to pass upon the evidence of criminality which alone justified a proceeding under it. This arrangement has supplied these deficiencies, and designated the mode and means to be adopted and pursued, with a view, as it would seem, to avoid the very difficulties which were supposed to be incident to the execution of the treaty of 1794.

It cannot be doubted that treaties may and often do create obligations, to the fulfilment of which the legislative power is an indispensable auxiliary. But such is not the character of the stipulation under consideration. This is capable of being carried into effect without the aid of Congress, which I hold, therefore, to be unnecessary.

The second objection is, in my opinion, equally untenable. The proceeding under the treaty is to be governed, in its conduct, not by the provisions of the Constitution of the United States, but by those prescribed by the parties who concluded it. The validity of the stipulations contained in the 10th article is in no wise dependent upon the character of the magistrate designated to hear and consider "the evidence of criminality" against the person accused. It was just as competent for the contracting Governments to have reposed that authority in executive as in judicial magistrates; and in the case of Thomas Nash, before referred to, the power was exercised by the President of the United States, and his conduct sanctioned, upon the principle, that, no special provision to the contrary having been made by the treaty, the function was, in its nature, executive.

This is not a case in law or equity within the scope and meaning of the first clause of the second section of the third article of the Constitution of the United States. The provisions of that section are applicable only to cases which assume "a legal form for forensic litigation and judicial decision," in which a final judgment may be rendered, and by whose decision the parties will be bound. It does not contemplate a question of the description under consideration, in reference to which a preliminary proceeding is authorized, as auxiliary to a power in its nature political, created, not by the Constitution, but emanating from the concurrent wills of two independent Governments. Had the treaty conferred upon the magistrate (if it could have been made competent to such an object) the power of trying the person charged for an offence committed within a foreign jurisdiction, and of punishing in case of ascertained guilt, the inquiry might

have presented itself in a different aspect. But the stipulations under consideration aim at no such end, but are confined to the ascertainment of facts which can weigh nothing in any consequent and purely judicial investigation of the charge.

It would seem to be clear, too, if the case be one of judicial cognizance, under and by force of the Constitution, that the jurisdiction once attaching would adhere to the subject until it had definitively disposed of it—a proposition which can in no sense be predicated of an offence committed within the dominions of a foreign Power. It is apparent, therefore, as I think, that the section of the Constitution invoked has nothing to do with the question of the authority of Commissioner Rapelje to act in this case. The circumstance that the preliminary inquiry involves matter upon which a judgment is to be exercised, does not necessarily refer it to the judicial department of the Government for decision. Almost every political question depends for its execution upon previous inquiry, involving judgment of the expediency of action or non-action.

Nor does it by any means follow, because the subject of inquiry naturally and fitly pertains to judicature, that, in matters extra-territorial, affecting the citizens of other Governments, or violations of their laws, that the treaty-making power may not competently create tribunals of its own to carry out and consummate its objects. Examples are not wanting, in our own experience, to show the sufficiency of this authority, not only to create, but to designate already existing tribunals, other than those which are judicial, to carry out and effectuate treaty provisions, and to prescribe their modes of proceeding, and the degree and kind of evidence by which their decisions shall be controlled. I have never supposed arrangements of this kind obnoxious to the objection, that they invaded the province of the judiciary, and were therefore void.

In my view, the provisions of the second section of the third article of the Constitution do not embrace this class of questions.

The third objection to the validity of the proceedings under review is to the operation, under any authority or state of circumstances, of the 10th article of the treaty of 1843, which is alleged to be void, merely because of its repugnancy to the Constitution of the United States; and it is very justly said, in the language of Justice Story, "though the power" to make treaties "is general and unrestrained, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it, and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory and of paramount authority within its scope, and no one embraces a right to annihilate any other. A treaty to change the organization of the Government or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void, because it would destroy what it was designed merely to fulfil—the will of the people."

But is there any thing in this article to render it obnoxious to this exception? The clauses of the Constitution upon which it is based are the 4th and 5th articles of the amendments. The first of these declares, that "the right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no warrant shall issue, *but upon probable cause, supported by oath*

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or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Now, I do not understand the provisions of the 10th article of the treaty of 1842 as being at all in conflict with this article of the Constitution, or that, in fulfilling it, as has been done in this case, the right of personal security of the accused has been assailed. The protection guarantied is not against *all seizures*; it is against unreasonable seizures; and seizures are to be made only upon probable cause, and, when authorized, the evidence of their reasonableness is to be furnished by oath or affirmation—all of which prerequisites have been complied with in this case.

Nor do I perceive how it can be supposed that there has been an infraction by these treaty stipulations of the fifth of the constitutional amendments, which, in declaring that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury," was never designed to embrace any other than offences against the United States. The offence charged by this proceeding is one against the Government of Great Britain, over which the courts of the United States can rightfully assume no jurisdiction, and for which, in these courts, the accused cannot be required to answer upon or without "a presentment or indictment by a grand jury."

The second clause of the 2d section of the 4th article of the Constitution has provided, "that a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

To carry out this provision of the Constitution; Congress, by an act of the 12th of February, 1793, enacted, that "whenever the Executive authority of any State in the Union, or of either of the Territories, shall demand any person as a fugitive from justice of the Executive authority of any such State or Territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment, or *an affidavit*, made before a magistrate of any State or Territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory to which such person shall have fled, to cause him or her to be arrested and secured."

It will thus be seen that, in a class of cases strongly analogous to that under consideration, the Congress of the United States have provided for the surrender of fugitives from justice, fleeing from State to State, upon the exhibition of an affidavit, and without presentment or indictment; and yet the constitutionality of that provision, practically, from day to day, carried out, has never, to my knowledge, been seriously questioned; and if, in its application to citizens of the United States, it may be regarded as a valid exercise of legislative power, I cannot imagine why it should not be equally so when brought by the treaty-making power to operate upon those who have a less strong claim to the protection of our fundamental laws.

But in what particular does the proceeding under review distinguish between the case of a party arrested as a fugitive, and that of a citizen charged with the commission of an offence against the United States? Did it ever occur to any one to suppose that a judge of the courts of the United States, or a commissioner or other officer authorized by the laws

of the United States to act in such cases, when engaged in an initiatory examination of one charged with an offence, for the purpose of determining whether he should be discharged, bailed, or imprisoned, to await the action of a grand jury, was trenching upon the protection guarantied by this particular provision of the Constitution? And can it be that our own citizens, for whose security this guarantee has been especially provided, shall be liable to such arrest and detention, in order that, in proper cases, they may be brought to trial; and yet that the subjects of Great Britain, whose personal rights we are under no special obligation to guard and watch over, but whom we are bound, by the most solemn of national obligations, to surrender to their own Government, upon proper demand, and who, upon investigation, are believed to have been guilty of grave offences against their own laws, shall enjoy an immunity from a like proceeding? It is surely enough that they are dealt with as are our own citizens; protected as they are by the same officers, and judged by the same rules of evidence.

The idea suggested in the petition or remonstrance of the accused, that the commissioner had no authority to cause her arrest, notwithstanding the affidavit made, because at that time there had been no requisition for her surrender, is without foundation, and can interpose no obstacle to the gratification of the demand which has been made.

The requisition is necessary, not for the purpose of the preliminary examination upon which "the evidence of criminality is to be heard and considered," but with a view to the surrender, after the ascertainment of the facts showing the party charged to be in a condition which justifies her apprehension and commitment for trial, according to the laws of the place where she is found. The surrender itself cannot be made till this criminality is ascertained and certified. The demand presupposes this ascertainment, and is therefore naturally and properly consequent upon it.

I have the honor to be, very respectfully, sir, your obedient servant,
JOHN NELSON.

Hon. A. P. UPSHUR,
Secretary of State.

[Copies of the original papers are not sent, because they are reviewed in the above opinion.]

Mr. Upshur to Mr. Fox.—[COPY.]

DEPARTMENT OF STATE,
Washington, August 10, 1843.

SIR: With reference to my letter of the 25th ultimo, in reply to your communication of the 24th of the same month, I have now the honor to inform you that a warrant was yesterday issued from this department, and transmitted to the marshal of the United States for the southern district of New York, requiring the surrender and delivery to George McKay, an officer of the Government of Her Britannic Majesty, or to any other officer of said Government duly authorized by you to receive her into custody, of Christina Cochran, *alias* Gilmour, a fugitive from justice, charged with the crime of murder, committed within the jurisdiction of Great Britain, whose

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surrender has been claimed by Her Majesty's Government from the Government of the United States, under the provisions of the tenth article of the treaty concluded at Washington on the 9th day of August last.

I pray you, sir, to accept the renewed assurance of my distinguished consideration.

A. P. UPSHUR.

HENRY S. FOX, Esq., &c.

Mr. Fox to Mr. Upshur.—[COPY.]

WASHINGTON, September 29, 1843.

SIR: I have the honor, herewith, to enclose to you an authentic copy of an act of Parliament, recently passed, and which has received the assent of Her Majesty, for giving effect to the 10th article of the treaty of Washington, which provides for the mutual surrender, in certain cases, of persons fugitive from justice.

I avail myself of this occasion to renew to you the assurance of my high consideration.

H. S. FOX.

Hon. A. P. UPSHUR, &c.

Mr. Upshur to Mr. Fox.—[COPY.]

DEPARTMENT OF STATE,

Washington, September 29, 1843.

SIR: I have the honor to acknowledge the receipt of your note of this day's date, enclosing an authentic copy of a recent act of Parliament for giving effect to the 10th article of the treaty of Washington, and to tender to you the renewed assurance of my distinguished consideration.

A. P. UPSHUR.

HENRY S. FOX, Esq., &c.

Mr. Upshur to Mr. Fox.—[COPY.]

DEPARTMENT OF STATE,

Washington, October 13, 1843.

SIR: An indictment having been found against Denison Rogers, a fugitive from justice, who is now supposed to be residing near Kingston, in Upper Canada, for the murder of his wife, Hannah Rogers, in the town of Plainfield, in the county of Otsego, and State of New York, I have, through you, to request that Her Britannic Majesty's Government will be pleased to issue the necessary warrant to deliver up the person of the above-named Denison Rogers to the sheriff of the county and State aforesaid, or to either of his deputies, to be by him, or one of them, conveyed back for trial.

I avail myself of this occasion to renew to you the assurance of my distinguished consideration.

A. P. UPSHUR.

HENRY S. FOX, Esq., &c.

Mr. Fox to Mr. Upshur.—[COPY.]

WASHINGTON, October 16, 1843.

SIR: I have this day had the honor to receive your letter of the 13th instant, containing a requisition for the arrest and surrender, by Her Majesty's authorities, of Denison Rogers, a fugitive from justice, against whom an indictment has been found for the murder of his wife, Hannah Rogers, at Plainfield, in the county of Otsego, New York, and who is supposed to be residing near Kingston, in Canada. I have lost no time in forwarding your application to the Governor General of British North America. I presume that the civil authorities of New York, to whom you refer, will duly furnish to the Canadian authorities the requisite testimony in the case, in order to enable them to act therein according to the treaty.

I avail myself of this occasion to renew to you the assurance of my high consideration.

H. S. FOX.

HON. ABEL P. UPSHUR, &c.

Mr. Upshur to Mr. Fox.—[COPY.]

DEPARTMENT OF STATE,

Washington, October 23, 1843.

SIR: Daniel Quick, a fugitive from justice, was indicted for the murder of Jacob S. Vangorden, on the 29th day of September, 1842, in Westfall township, Pike county, Pennsylvania, and is now supposed to be residing in Canada. I have therefore, through you, to request that Her Majesty's Government will be pleased to issue the necessary warrant to deliver up the person of the above-named Daniel Quick to John M. Heller, of the county and State aforesaid, or to any other person duly authorized to receive him, in order that he may be conveyed back for trial.

I avail myself of this occasion to offer to you the renewed assurance of my distinguished consideration.

A. P. UPSHUR.

HENRY S. FOX, Esq., &c.

Mr. Fox to Mr. Upshur.—[COPY.]

WASHINGTON, October 25, 1843.

SIR: I have the honor to acknowledge the receipt of your letter of the 23d instant, containing a requisition for the surrender, by Her Majesty's authorities, of Daniel Quick, a fugitive from justice, charged with the murder of Jacob S. Vangorden on the 29th of September, 1842, in Westfall township, Pike county, Pennsylvania, and who is supposed to be now residing in Canada.

I have lost no time in transmitting this requisition to the Governor General of British North America.

I avail myself of this occasion to renew to you the assurance of my high consideration.

H. S. FOX.

HON. ABEL P. UPSHUR, &c.

Mr. Fox to Mr. Upshur.—[copy.]

WASHINGTON, November 22, 1843.

SIR : With reference to your letter of the 13th of October, containing a requisition for the surrender, by Her Majesty's authorities, of Denison Rogers, a fugitive from justice, charged with the commission of murder in the State of New York, which requisition was transmitted by me to the Governor General of British North America, I have now the honor to enclose the copy of a despatch received from the Governor General, stating, as you will see, that Denison Rogers shall be immediately arrested, if he can be found in Canada, and delivered to the authorities of the State of New York, upon the production of the requisite testimony.

I avail myself of this occasion to renew to you the assurance of my distinguished consideration.

H. S. FOX.

Hon. ABEL P. UPSHUR, &c.

[ENCLOSURE.]

KINGSTON, (CANADA,) October 28, 1843.

SIR : I have the honor to acknowledge the receipt of your Excellency's letter of the 16th instant.

No time shall be lost in arresting Denison Rogers, if he can be found in Canada ; and, on the receipt of the requisite testimony from the authorities of the State of New York, he shall be surrendered to any person commissioned to take charge of him.

I have the honor to be, &c.

C. T. METCALFE.

H. S. Fox, Esq., &c.

Mr. Fox to Mr. Upshur.—[copy.]

WASHINGTON, November 22, 1843.

SIR : With reference to your letter of the 23d of October, containing a requisition for the surrender, by Her Majesty's authorities, of Daniel Quick, a fugitive from justice, charged with the commission of murder in the State of Pennsylvania, which requisition was transmitted by me to the Governor General of British North America, I have now the honor to enclose the copy of a despatch received from the Governor General, stating, as you will see, that Daniel Quick shall be immediately arrested, if he can be found in Canada, and delivered over to the authorities of the State of Pennsylvania, upon the production of the requisite testimony.

I avail myself of this occasion to renew to you the assurance of my distinguished consideration.

H. S. FOX.

Hon. ABEL P. UPSHUR, &c.

[ENCLOSURE.]

KINGSTON, (CANADA,) November 2, 1843.

SIR: I have the honor to acknowledge the receipt of your despatch of the 25th of October.

Daniel Quick shall be apprehended, as soon as his place of residence can be ascertained, and shall be surrendered to any person authorized on the part of the State of Pennsylvania to take charge of him, on the production of the requisite testimonies.

I have the honor to be, &c.

C. T. METCALFE.

H. S. Fox, Esq., &c.

Mr. Upshur to Mr. Fox.—[COPY.]

DEPARTMENT OF STATE,

Washington, December 1, 1843.

SIR: It appears, from evidence recently communicated to this department, that an individual named Ezra Selleck, charged with the offence of uttering and publishing counterfeit money, in September last, at the town of Lansing, in the county of Tompkins, and State of New York, has fled from the United States, and sought refuge in Canada, and that he is now believed to be residing near the western termination of the Welland canal, within the jurisdiction of Her Britannic Majesty.

By the President's direction, I have the honor to request, through you, that Her Majesty's Government will be pleased to issue the necessary warrant for the delivery of the person of the above-mentioned Ezra Selleck to Benjamin D. Quigg, of the county and State aforesaid, or to any other officer duly authorized to receive the fugitive in question, to be conveyed to this country for trial.

The officer deputed to pursue and bring back the fugitive criminal will cheerfully take charge of and deliver any requisition you may think proper to address to the British provincial authorities on the subject of this note. If sent to this department, such requisition will be forthwith forwarded to Mr. Quigg for that purpose.

I avail myself of this occasion to renew to you the assurance of my distinguished consideration.

A. P. UPSHUR.

HENRY S. Fox, Esq., &c.

Mr. Fox to Mr. Upshur.—[COPY.]

WASHINGTON, December 15, 1843.

SIR: I have the honor to enclose to you a letter which I have addressed to the Governor General of British North America, containing the requisition, transmitted to me in your letter of the 1st instant, for the surrender, by Her Majesty's authorities, of the American fugitive criminal, Ezra Selleck.

The enclosed packet ought to have been sent to your department some days since, but was mislaid, owing to an accident which I much regret. In the mean time, however, I addressed by the post a duplicate of the same communication to the Governor General, which he will have received, and, I have no reason to doubt, be prepared to act upon.

I avail myself of this occasion to renew to you the assurance of my distinguished consideration.

H. S. FOX.

HON. ABEL P. UPSHUR, &c.

Mr. Upshur to Mr. Fox.—[COPY.]

DEPARTMENT OF STATE,

Washington, December 27, 1843.

SIR: An indictment for forgery having been found against James Walker, formerly of the city of Albany, in the State of New York, but now a fugitive from justice in Canada, I have, through you, to request that Her Majesty's Government will be pleased to issue the necessary warrant to deliver up the person of the above-named James Walker to Mr. John Baker, one of the police constables of the aforesaid city of Albany, or to any other person duly authorized to receive the said fugitive, in order that he may be conveyed to the United States for trial.

The officer deputed to pursue and bring back the fugitive criminal will cheerfully take charge of and deliver any requisition you may think proper to address to the British provincial authorities on the subject of this note; and if the requisition in question is sent to this department, it will be forwarded to Mr. Baker for that purpose.

I avail myself of this occasion to renew to you the assurance of my distinguished consideration.

A. P. UPSHUR.

HON. HENRY S. FOX, Esq., &c.

Mr. Fox to Mr. Upshur.—[COPY.]

WASHINGTON, *December 28, 1843.*

SIR: In compliance with the suggestion in your note addressed to me, of yesterday's date, I have the honor, herewith, to transmit an official communication which I have addressed to his Excellency the Governor General of British North America, conveying to him the requisition, contained in your before-mentioned note, for the delivery, by Her Majesty's authorities, of an American fugitive from justice named James Walker, charged with the commission of forgery in the city of Albany, and State of New York, and who, it appears, has fled from the United States into Canada.

I avail myself of this occasion to renew to you the assurance of my distinguished consideration.

H. S. FOX.

HON. ABEL P. UPSHUR, &c.

Mr. Everett to Mr. Upshur.—[EXTRACT.]

LONDON, September 14, 1843.

A day or two since I made application to Lord Aberdeen for the surrender of Nathaniel Britton, otherwise known as John C. Clinton, *alias* John Reed, accused of having committed forgery in the United States, and now demanded as a fugitive from justice under the tenth article of the treaty of Washington. I transmit, with the copy of my letter to Lord Aberdeen, a copy of the affidavit of Mr. Jacob Little, of New York, setting forth the circumstances of the forgery. I sent the original of the affidavit, with my note, to the Foreign Office. Lord Aberdeen being absent from the country, in attendance on the Queen upon her visit to Belgium, I called upon Lord Canning, one of the Under Secretaries of State, to desire that the application might be attended to without unnecessary delay, which he promised me should be done. I have since received a note, written in Lord Aberdeen's name, informing me that my application had been referred to the Home Department. I apprehend no unreasonable delay in acting upon it.

I have also, at the request of the consul of the United States here, made application for the surrender of Andrew Pollock, as a fugitive from justice. The affidavit sent from the United States as the basis of the demand is not as well authenticated as could be wished. * * * * * On the present occasion, the substantial justice of making the demand was too manifest to admit a doubt; and I should have thought it wrong to hesitate for want of official formalities. I transmit, with the papers pertaining to these applications, a copy of the act of Parliament to carry into effect the tenth article of the treaty.

[ENCLOSURE.]

46 GROSVENOR PLACE, September 12, 1843.

The undersigned, envoy extraordinary and minister plenipotentiary of the United States of America, has the honor to transmit to the Earl of Aberdeen, Her Majesty's Principal Secretary of State for Foreign Affairs, the accompanying deposition of Mr. Jacob Little, of New York, setting forth the circumstances of a forgery committed by Nathaniel Britton, for the purpose of defrauding the said Little and his partner of a large sum of money, which purpose was effected. The deposition of Mr. Little was made in due form before the recorder of the city of New York, and is authenticated by Her Majesty's consul at that place.

The nature of the crime committed by Britton will sufficiently appear from the other documents pertaining to the case, [which] have been laid before the undersigned, and especially one of the American bank notes on which the forgery was committed. These notes and documents will, if desired, be submitted, for Lord Aberdeen's inspection; but they will of course be needed for such further proceedings as may be had in the American courts against the individual charged with the forgery.

This individual has already been convicted in the United States of larceny, and twice of forgery. He has assumed various names at different

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times, and, as the undersigned believes, was arrested a short time since in this country, under the name of John C. Clinton, *alias* John Reed, for a crime committed in England. An officer of the police of New York is in London, who has identified his person to the satisfaction of the police court, before which he has been brought up in this city.

The undersigned has the honor to request that the Earl of Aberdeen would cause the requisite steps to be taken for the examination of the said Britton, *alias* Clinton, *alias* Reed, in order to his being surrendered as a fugitive from justice, under the tenth article of the treaty of Washington, to be sent to the United States for trial for the forgery described in the accompanying affidavit.

The undersigned is advised that it would greatly promote the convenience of the officer who has been sent to receive the individual in question, to have him surrendered in season to be taken to America by the royal mail steamer of the 19th instant. The proceedings which have already taken place before the police court of this city, in reference to the offence with which he stands charged in London, will, it is believed, enable the magistrates to proceed without loss of time in the examination requisite to enable them to come to a decision on the application for his surrender.

The undersigned has the honor to offer to Lord Aberdeen the assurance of his distinguished consideration.

EDWARD EVERETT.

Earl of ABERDEEN, &c.

[ENCLOSURE.]

Her Britannic Majesty's Consulate, New York:

I, Anthony Barclay, Esquire, Her Majesty's consul, do hereby certify that Frederick A. Tallmadge, Esq., who has set his name to the jurat of the annexed deposition of Mr. Jacob Little, is the recorder of the city of New York, and as such is by law authorized to administer oaths.

In testimony whereof, I have hereunto affixed my seal of office, this 31st day of July, 1843.

ANTHONY BARCLAY.

[ENCLOSURE.]

UNITED STATES OF AMERICA.

STATE OF NEW YORK,

City and County of New York, ss:

Jacob Little, of the city, county, and State of New York, one of the firm of Jacob Little & Co., stock and exchange brokers, which firm is composed of this deponent and Edward B. Little, being duly sworn according to law, doth depose and say: That on the fifteenth day of April, one thousand eight hundred and forty-one, an individual representing himself to be Nathaniel Britton called at the office of deponent and his copartner, and presented to this deponent, for negotiation, a paper purporting to be a cer-

tificate of deposite, partly written and partly printed, in the words and figures following :

No. 422.]

NEW ORLEANS, *March 20, 1841.*

Commercial Bank of New Orleans.

Nathaniel Britton has deposited in this bank the sum of twenty-three thousand Mexican dollars, for the use and payable to the order of Nathaniel Britton, endorsed hereon, and the return of this certificate, (in Mexican dollars.)

\$23,000.

GEORGE O. HALL, *Cashier.*

Endorsed :

Pay H. Bean & Co., or order.

NATHANIEL BRITTON.

Pay H. Bean & Co., or order.

NATHANIEL BRITTON.

And at the same time, for the purpose, as he stated, of satisfying deponent as to his identity with the person in whose favor such certificate was made payable, presented to deponent a written paper, purporting to be from George O. Hall, cashier of the Commercial Bank of New Orleans, by which said written paper the said George O. Hall, as such cashier, was made to certify as to the respectability of the said Nathaniel Britton, and as to his having taken that method of remitting his funds to the city of New York. That deponent was induced by such letter, and the representation of said individual, calling himself, as aforesaid, Nathaniel Britton, and by his knowledge of the solvency of said Commercial Bank of New Orleans, to discount said pretended certificate of deposite at one per cent., and then and there gave to the said individual the check of said firm on the Union Bank, in the said city of New York, and dated the said fifteenth day of April, 1841, for twenty-two thousand seven hundred and seventy dollars, and for which the said person received from the said bank current funds for the same; and that deponent then received the said paper, purporting to be such certificate of deposite, from the said person, calling himself Nathaniel Britton, who then and there, in the presence of deponent, endorsed the said paper with the name of Nathaniel Britton, as herein before stated and particularly set forth. And deponent further says, that, in due course, he caused said paper, purporting to be such certificate, to be presented for payment at the Commercial Bank of New Orleans, which was refused; and that deponent was then informed, and believes, that such paper had been originally issued for the sum of one hundred and twenty-three dollars, and had been altered to the amount of twenty-three thousand dollars; and that a paper, purporting to be a letter from George O. Hall, had been fraudulently obtained from such banking-house, while containing only the signature of said Hall, and the letter written over the signature of the said George O. Hall; and that the said person so representing himself as Nathaniel Britton was utterly unknown to the said Hall.

And this deponent further says: That he and his said copartner were thereby defrauded of the amount of their said check; nor have they since received any part thereof, from any person whomsoever.

And this deponent further says: That he has been informed, and believes,

that said individual, so calling himself Nathaniel Britton, purchased with some of the funds thus obtained from the said Union Bank, in the said city of New York, on the check of deponent and his partner, United States Treasury notes, the full particulars of which deponent is not now able to state; but, as he has been informed and believes, the said individual purchased of G. W. Beebe, [of Philadelphia, nine Treasury notes of the United States of America, of the dates, amounts, and numbers, respectively, as follows: No. 198, letter C; No. 206, B; No. 209, B; No. 210, C—all dated the third day of March, 1841, for one thousand dollars each, payable to the order of M. Tiernan. No. 113, B; No. 114, A; No. 115, A; No. 116, B; No. 117, C—all dated the sixth day of March, 1841, for one thousand dollars each, payable to the order of P. Muhlenberg, and by him endorsed, payable to Winter & Co., by them endorsed, payable to G. W. Beebe, who endorsed the same without recourse.

And this deponent further says: That he has been informed, and believes, that one John Reed, *alias* Dawson, *alias* Martin, *alias* Clinton, has been arrested by the authorities in London, in that part of the kingdom of Great Britain called England, having in his possession certain United States Treasury notes, corresponding in numbers, amounts, and dates, with some one or more of the said United States Treasury notes, so purchased of the said G. W. Beebe, in Philadelphia aforesaid, by the said individual, so calling himself Nathaniel Britton; and that, from the personal description of the said Reed, *alias* Dawson, *alias* Martin, *alias* Clinton, this deponent has reason to believe, and does believe, that he is the same person who defrauded this deponent and his copartner of the said sum of twenty-two thousand seven hundred and seventy dollars.

And this deponent further says: That an individual, calling himself Charles Webb, *alias* Reed, *alias* Dawson, *alias* Martin, *alias* Clinton, *alias* Britton, was privy to and an accomplice with the said person calling himself Nathaniel Britton, in the said fraud committed upon this deponent and his copartner.

And this deponent says: That he has reason to believe that the said certificate, purporting to be issued by the Commercial Bank of New Orleans, was wilfully and fraudulently altered by the said person calling himself Nathaniel Britton, *alias* Reed, *alias* Dawson, *alias* Martin, *alias* Clinton, or by his accomplice, calling himself Charles Webb, for the purpose of defrauding this deponent and his said copartner; and that thereby the said individuals calling themselves Nathaniel Britton and Charles Webb, by what name soever they may be now known, are guilty of the crime of forgery, and liable to be arrested and punished therefor.

JACOB LITTLE.

Sworn to the 31st of July, 1843, before me,

F. A. TALLMADGE,

Recorder of the City of New York.

[ENCLOSURE.]

FOREIGN OFFICE, September 13, 1843.

The Earl of Aberdeen, Her Majesty's Principal Secretary of State for Foreign Affairs, has the honor to acknowledge the receipt of the letter,

dated the 12th instant, from Mr. Everett, envoy extraordinary and minister plenipotentiary of the United States of America at this Court, in which he requests that an individual named Nathaniel Britton, accused of forgery in America, and at present in England, may be arrested and surrendered to the United States Government, agreeably to the provisions of the 10th article of the treaty of Washington.

The Earl of Aberdeen has lost no time in recommending Mr. Everett's request to Her Majesty's Principal Secretary of State for the Home Department, in whom resides the power of giving effect to requisitions of this nature.

EDWARD EVERETT, Esq., &c.

[ENCLOSURE.]

46 GROSVENOR PLACE, *September 14, 1843.*

The undersigned, envoy extraordinary and minister plenipotentiary of the United States of America, has the honor to enclose to the Earl of Aberdeen, Her Majesty's Principal Secretary of State for Foreign Affairs, the accompanying affidavit of David Thompson, cashier of the Bank of America at New York, setting forth the circumstances of an act of robbery and embezzlement of the moneys of that institution, to the amount of more than \$25,000, by Andrew Pollock, late a clerk in the said bank.

It is understood that Pollock fled to England in the month of July, last year. It is not at present known where he is, but it is supposed that he is either in England or Scotland.

The undersigned has the honor to request that the Earl of Aberdeen would take the necessary measures to cause the said Pollock to be arrested, and examined by competent authority, with a view to his surrender, under the tenth article of the treaty of Washington, as a fugitive from justice, in order to his being sent to the United States for trial.

The undersigned avails himself of this opportunity to tender to Lord Aberdeen the assurance of his distinguished consideration.

EDWARD EVERETT.

The Earl of ABERDEEN, &c.

[ENCLOSURE.]

UNITED STATES OF AMERICA.

STATE OF NEW YORK,

City and County of New York, ss :

David Thompson, of the city of New York, in the State of New York, in the United States of America, being duly sworn, doth depose and say : That he is the cashier of the president, directors, and company of the Bank of America, which is a corporation duly created by the Legislature of the said State of New York, now lawfully subsisting, and in full force and effect for banking purposes, and located and doing business in the said city of New York. And this deponent further says, that Andrew Pollock, late of the said city of New York, is now justly and truly indebted to the said

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the president, directors, and company of the Bank of America, in the sum of \$25,000 and upwards, lawful money of the United States, which is equal to the sum of £5,165 and upwards, sterling money of Great Britain, for so much money had and received by the said Andrew Pollock, to and for the use of the said the president, directors, and company of the Bank of America; that the said Andrew Pollock was, until he absconded, as hereinafter mentioned, and had been for the last preceding eight years, or thereabouts, one of the clerks in the service and employment of the said the president, directors, and company of the Bank of America, acting during most of that period as one of the book-keepers; and that, while he acted as such book-keeper, he did, by means of certain false and fraudulent entries and erasures made by him in the books of the said the president, directors, and company of the Bank of America, kept by him, privately and fraudulently withdraw from, and appropriate and convert to his own use, the moneys and funds of the said the president, directors, and company of the Bank of America, to the above-mentioned amount of \$25,000 and upwards, lawful money of the United States; that the said Andrew Pollock clandestinely, and under false pretences, left the said service and employment on the 13th day of July, 1842, and absconded; and that he thereupon, as this deponent is informed and believes, took passage, and embarked at Boston, on board the British steamer Caledonia, bound for England; that, since his said absconding, and not before, his aforesaid appropriation and conversion to his own use of the said moneys and funds have been discovered, and the amount thereof, to at least the sum above specified, satisfactorily ascertained.

D. THOMPSON.

Subscribed and sworn to before me, this 21st day of April, A. D. 1843, at the city of New York.

WILLIAM INGLIS,

Associate judge of the court of common pleas for the city and county of New York, in the State of New York, ex officio a justice of the peace, and authorized to administer oaths to be read in all courts of justice and in all legal proceedings.

CITY OF LONDON, ENGLAND,

Kingdom of Great Britain, ss :

I, Clayton Newbold, of the city, county, and State of New York, the United States of America, now residing at Wood's hotel, Furnival's In. in the city of London, do solemnly and sincerely declare, that I was present on the 21st day of the month of April last, and did see David Thompson, of the city of New York aforesaid, and chief cashier of the Bank of America, in said city, subscribe and swear the foregoing affidavit before William Inglis, associate judge of the court of common pleas for the city and county of New York, in the State of New York aforesaid, ex officio a justice of the peace, and authorized to administer oaths to be read in all courts of justice and in all legal proceedings; that the name "D. Thompson," set and subscribed at foot of said affidavit, is of the proper handwriting of the said David Thompson; and that the name "William Inglis," set and subscribed at foot of the jurat of the said affidavit, is of the proper handwriting of the above-described William Inglis, who administered oath to the said

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David Thompson, and affixed his signature to the said affidavit in my presence. And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of an act made and passed in the sixth year of the reign of his late Majesty King William IV, entitled "An act to repeal an act of the present session of Parliament, entitled 'An act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extra-judicial oaths and affidavits; and to make other provisions for the abolition of unnecessary oaths.'"

CLAYTON NEWBOLD.

Declared before me, at the Mansion House of the city of London, this 29th day of May, Anno Domini 1843.

JOHN HUMPHERY, *Mayor*.

(Stamped) LONDON.

Mr. Everett to Mr. Upshur.—[EXTRACT.]

LONDON, October 16, 1843.

I received also, on the 5th of October, a note from the Foreign Office, informing me that a warrant had been issued from the Home Department for the apprehension of Britton, *alias* Clinton, charged with having committed forgery in the United States. The proceedings under this warrant, I am sorry to say, were of a highly unsatisfactory nature. This person was originally arrested on a charge of attempting to negotiate in this city a note or notes of the United States Treasury, of which the endorsement had been altered—a crime of which he was no doubt guilty. On his examination before the magistrate upon this charge, evidence sufficient to warrant his being fully committed for trial was not produced, and he was remanded till the 5th instant, to afford time for the production of further proof. The evidence requisite to establish the forgery, if one had been committed by altering the endorsement, (which alteration, if I am rightly informed, consisted in effacing the name of a person who had endorsed the notes "without recourse,") was to be obtained from the United States. The length of time necessary to procure such additional evidence, and the uncertainty of the result, induced the agents of the parties against whom the original forgery in the United States had been committed to request me to apply for his extradition, under the tenth article of the treaty of Washington. This, as you have been duly apprized in my former despatches, was accordingly done.

On the 5th instant, the individual was brought up before Sir Peter Laurie, on the charge of attempting to negotiate in this country the altered Treasury notes; and, as no further evidence was produced, he was of course liberated from all further detention under that charge. An inspector of police proceeded forthwith to arrest him under the warrant from the Home Department, which had issued on my application. * * * He (Clinton) was brought up the next day before Mr. Jardine, the Bow street magistrate, and, after a very summary hearing of the case, was wholly discharged. A report of the proceedings before the Bow street magistrate

will be found in the morning papers of the 7th instant, which you will receive by this steamer. I learn by a note from Colonel Aspinwall, a copy of which is herewith transmitted, that this report is substantially correct. I lost no time in applying to Lord Aberdeen for an authentic statement of the circumstances which led to the discharge of Clinton. This has been promptly furnished, in a note from Lord Aberdeen, and its accompanying enclosures, herewith transmitted. One of these enclosures is a letter from Mr. Jardine, the Bow street magistrate, stating the grounds of his procedure in declining to issue a warrant for the further detention of Clinton, with a view to his extradition.

These grounds I cannot but regard as very unsatisfactory. They consist of the inferences of the magistrate from the language of the second section of the act passed to carry into effect the tenth article of the treaty. Mr. Jardine infers from this section that it is required by the act in question that "copies" only of the depositions on which the "original warrant issued" (by which he understands in this case the warrant originally issued in America for the arrest of Clinton in that country) are admissible as evidence of criminality on which the British magistrate can commit a fugitive for extradition. The document accompanying my application was the original affidavit, made before the recorder of New York, by J. Little & Co., on whom the forgery was committed. And it does not appear that any warrant for Clinton's arrest was ever issued in the United States. In transmitting the affidavit in question, I informed Lord Aberdeen that I had in my keeping the original paper forged, and other pieces of evidence, which I would submit to any person authorized to examine them. These papers were placed by me in the hands of the solicitor who appeared in behalf of the application, on the 6th instant, and that fact was signified by the solicitor to the magistrate, but he does not appear to have taken any notice of it.

I have no belief that Mr. Jardine has rightfully interpreted the act of Parliament. If he has, it would follow that no person could be here arrested for extradition, against whom a warrant had not first issued in the United States. This certainly is not expressed in the treaty, which requires only such evidence of criminality as would warrant commitment for trial in the country from which the extradition is demanded. Copies of affidavits on which a former warrant had been issued are certainly not required in order to commit for trial. If they were, of course no person could be committed. There must be a beginning to the proceedings, and whatever would authorize that beginning in England—that is, the commitment for trial—is, by the treaty, sufficient evidence of criminality to warrant the extradition.

Mr. Jardine says that, at common law, an original affidavit would not be evidence. However that may be, the statute to carry the treaty into effect assumes such original affidavit to be evidence sufficient in order to commitment for trial, and that in the very section of the act from which Mr. Jardine infers that copies only are admissible for that purpose. * * *

There are undoubtedly cases where the ends of justice would be defeated if all proceedings toward the extradition of a fugitive from the United States were to be delayed till a warrant had been issued by an American magistrate, and copies prepared of the depositions on which the said warrant was granted. As the treaty does not make this course necessary, Parliament cannot be presumed to have prescribed it; in fact, neither party to

the treaty can add to its requirements. At the same time, I cannot but think it desirable that applications for extradition should be made with greater form than was observed in this case.

I have not had time, since the receipt of Lord Aberdeen's note of the 14th, and the accompanying papers, fully to consider what course it is best for me to take. I am disposed briefly to acknowledge their receipt, to acquaint Lord Aberdeen that I consider Mr. Jardine's reasons for refusing to interfere insufficient, and leave the matter for your instructions.

[ENCLOSURE.]

FOREIGN OFFICE, October 5, 1843.

The Earl of Aberdeen, Her Majesty's Principal Secretary of State for Foreign Affairs, has the honor to inform Mr. Everett, envoy extraordinary and minister plenipotentiary from the United States of America, with reference to his letter to Mr. Everett of the 13th ultimo, that a letter has been received from the Home Department, stating that a warrant has been issued for the apprehension of Nathaniel Britton, *alias* John C. Canton, accused of having committed the crime of forgery in America, for the purpose of his being dealt with according to the provisions of the 10th article of the treaty of Washington, between Her Majesty and the United States of America.

EDWARD EVERETT, Esq., &c.

[ENCLOSURE.]

CONSULATE OF THE UNITED STATES,

London, October 7, 1843.

SIR: I have the honor to report to you that the examination of Clinton, *alias* Reed, the person who was arrested under the warrant of Her Britannic Majesty's Secretary of State, obtained on your requisition, terminated yesterday in his discharge.

The magistrate at the Bow street police office, Mr. Jardine, decided that the original deposition of the defrauded party, taken before the magistrate at New York, was not admissible, either under the general law of evidence in criminal cases, or under the particular provisions of the act for giving effect to the treaty. In the second section of that act, he said copies only, not originals; are specified, and the copies thereby allowed to be given in evidence must be those of such original depositions as were the foundation of the original American warrant.

As Mr. Bush, the solicitor, had no other evidence to offer, Mr. Jardine declined to grant a warrant, and accordingly the prisoner was discharged.

The newspapers of this morning give the details of the examination with substantial correctness.

I have the honor to be, sir, your most obedient servant,

THOMAS ASPINWALL.

His Excellency EDWARD EVERETT, &c.

[ENCLOSURE.]

46 GROSVENOR PLACE, October 7, 1843.

The undersigned, envoy extraordinary and minister plenipotentiary of the United States of America, has the honor to acknowledge the receipt of the note of the Earl of Aberdeen, Her Majesty's Principal Secretary of State for Foreign Affairs, of the 5th instant, acquainting the undersigned that a letter had been received at the Foreign Office, from the Home Department, stating that a warrant had been issued for the apprehension of Nathaniel Britton, *alias* John C. Clinton, accused of having committed the crime of forgery in America, for the purpose of his being dealt with according to the provisions of the tenth article of the treaty of Washington.

The undersigned learns that the individual whose surrender was applied for was brought before the magistrate at Bow street yesterday, and promptly discharged from further detention.

As the affidavit of the parties against whom the forgery was committed was before the magistrate, and the identical paper forged, with other evidence of the most conclusive character, was stated by the solicitors on behalf of the application for surrender to be in court, the undersigned conceives that the conditions of the tenth article of the treaty were fully complied with in the "production of such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed."

Such being the case, the immediate liberation of a criminal, notorious for repeated offences of a dangerous character against the community, and whose surrender had been applied for by the undersigned, is, in his opinion, to be regretted; and he respectfully requests that Lord Aberdeen would cause an authentic report to be made, for the information of the American Government, of the circumstances which have led to this result.

The undersigned avails himself of this opportunity to renew to Lord Aberdeen the assurance of his high consideration.

EDWARD EVERETT.

The Earl of ABERDEEN, &c.

[ENCLOSURE.]

FOREIGN OFFICE, October 14, 1843.

The undersigned, Her Majesty's Principal Secretary of State for Foreign Affairs, has the honor to acknowledge the receipt of the note dated the 7th instant, from Mr. Everett, envoy extraordinary and minister plenipotentiary from the United States of America, requesting to be furnished with an authentic account of the circumstances which led to the discharge at Bow street, on the 6th instant, of Nathaniel Britton, *alias* J. C. Clinton, for whose surrender to the American Government a warrant had been issued.

The undersigned lost no time in forwarding Mr. Everett's application to the Home Department; and the undersigned has now the honor to transmit to Mr. Everett a copy of a letter from that office, accompanied by a report of

the magistrate before whom Nathaniel Britton was brought up for examination, detailing the reasons which induced him to discharge the prisoner.

The undersigned has the honor to renew to Mr. Everett the assurances of his high consideration.

ABERDEEN.

EDWARD EVERETT, Esq., &c.

[ENCLOSURE.]

WHITEHALL, *October 13, 1843.*

SIR : With reference to your letter of the 7th instant, forwarding a copy of a note from Mr. Everett, the United States minister at this Court, I am directed by Secretary Sir James Graham to transmit to you the enclosed copy of a letter from Mr. Jardine, reporting the circumstances which led to the discharge, at Bow street police court, of Nathaniel Britton, who was charged with forgery in America ; and I am to request that you will submit the same to the Earl of Aberdeen.

I am, &c.

H. MANNERS SUTTON.

H. U. ADDINGTON, Esq., &c.

[ENCLOSURE.]

POLICE COURT, BOW STREET,

October 12, 1843.

SIR : I have to acknowledge the receipt of your letter of the 9th instant, desiring me to transmit to you a report of the circumstances which led to the discharge, at the Bow street police court, of Nathaniel Britton, who was charged with forgery in America, and for whose extradition to the American Government a warrant had been issued; and, in accordance with your desire, I now beg leave to transmit to you my report.

Nathaniel Britton was brought to the police court in Bow street on the 6th instant, in the custody of an inspector of police ; and an application was made to me there, in the presence of the prisoner, for a warrant to commit him to jail under the statute 6 and 7 Vict., c. 76, which I declined to issue. I did not discharge him from custody, or in any respect interfere with the arrest which had been previously made, and the authority for which was not discussed or stated before me.

The warrant of the Secretary of State, originating the jurisdiction of inferior magistrates, appeared to me to be in every respect regular ; but I declined to issue a warrant, because I thought the evidence of criminality tendered to me was inadmissible in point of law, and, consequently, that I had no authority to commit the prisoner. The only evidence of criminality produced was a document purporting to be an original deposition taken before the recorder of New York, and which, though clearly not legal evidence by the common law, was offered as a special means of proof authorized by the 2d section of the statute. I thought that the deposition was not receivable in evidence under that section, for the following reasons :

In the first place, the 2d section declares that copies of depositions only may be received in evidence, whereas the document tendered to me was an original deposition. Whether an original document, which is in itself not legal evidence, can be received in evidence by virtue of a statute which expressly authorizes the reception of a copy, is a doubtful question in our law, even with relation to civil proceedings. In 1796, the court of King's Bench decided, in a settlement case, that the original document was evidence under such circumstances. (*Rex vs. Warley*, 6 Term Reports, 534.) On the other hand, it was held by Lord Ellenborough, in 1809, in an action of replevin, that if any document, which itself is not evidence at common law, be made evidence by act of Parliament, a copy must be produced, and the original is not made admissible evidence by implication. (*Burdon vs. Ricketts*, 2 Campbell's Reports, 121.) Both the above cases related to civil actions, whereas the application to me was to enforce a penal law, directly affecting personal liberty; and in such a proceeding I thought that a well-known principle in the construction of penal statutes applied, viz: that where a penal statute introduces an exception to the general law, the words are to be taken strictly, and cannot be extended by implication. Although, therefore, I did not entirely act upon this objection in declining to issue a warrant, I certainly considered it to be a serious difficulty.

The other objections to admitting the deposition tendered to me as legal evidence appeared to me to be quite conclusive. The documents which a magistrate is authorized by the 2d section of the statute to receive in evidence are copies of depositions upon which the original warrant was granted, certified under the hand of the person issuing such warrant, and attested as true copies. There is some obscurity in the language of the statute in this respect, which does not sufficiently designate the person who is to give this certificate. It was contended, by the gentleman who attended professionally to support the application for a commitment, that the person intended was the Secretary of State, because the only warrant previously mentioned in the statute, to which the words "original warrant" could be referred, was the warrant of the Secretary of State originating the proceedings in this country. If this be the meaning of the statute, the deposition could not of course have been received in evidence, because it was not certified by the Secretary, Sir James Graham. But whoever may be the person required to certify by the statute, it seems to me to be very clear that the Secretary of State is not intended by the above words, because he does not act, under the statute, upon depositions of witnesses, but solely upon the requisition of the American minister. I conceive that the person issuing the original warrant must be understood to be the judge or magistrate in America to whom application is first made for the apprehension of the offender. If so, in order to authorize the reception of the depositions taken before him as legal evidence under the 2d section, they must be expressly certified under his hand. The deposition tendered in evidence to me was not certified under the hand of the recorder of New York, as the deposition upon which he had issued a warrant, nor indeed was there any proof given or tendered that any warrant had been issued by him or any other magistrate in America, nor that the deposition in question had been taken in support of an application for a warrant.

Entertaining, therefore, a strong opinion, founded upon the above reasons, that the deposition tendered to me in support of the application was

not legal evidence, I declined to issue my warrant for the commitment of the prisoner to jail.

Upon referring to the date of the statute 6 and 7 Vict., c. 76, and of the deposition taken in America, it is clear that the provisions of the statute, authorizing the reception of depositions in evidence in England, when certified in a proper manner, could not have been known to the recorder of New York at the time of his transmission of the deposition taken by him. It is obvious, therefore, that the impediment which occurred in this particular case could not have been prevented, and that it is not likely to occur again, after the provisions of the statute have been promulgated in America.

I have, &c.

DAVID JARDINE.

HON. H. MANNERS SUTTON, &c.

Mr. Everett to Mr. Upshur.—[EXTRACT.]

LONDON, November 1, 1843.

* * * * *

I transmit with this despatch a letter from the Foreign Office, informing me that Sir James Graham, acting under the advice of the law officers of the Crown, had felt himself obliged to decline issuing his warrant for the apprehension of Andrew Pollock, charged with fraudulently appropriating the moneys of the "Bank of America," in New York. Pollock's surrender, as a fugitive from justice, had been applied for by me, at the instance of the consul of the United States for this port. The ground of refusal is, that "embezzlement" is not one of the offences provided for by the treaty of Washington. It may be proper to add, that it is not known where Pollock is; and that the surrender was applied for only in the hope that his place of concealment might be discovered.

* * * * *

[ENCLOSURE.]

FOREIGN OFFICE, October 17, 1843.

The undersigned, Her Majesty's Principal Secretary of State for Foreign Affairs, has the honor to acknowledge the receipt of the note which Mr. Everett, envoy extraordinary and minister plenipotentiary of the United States of America, addressed to him in the month of September, requesting that a person named Andrew Pollock, charged with the fraudulent appropriation of moneys belonging to the Bank of America, and supposed to be at present either in England or Scotland, might be arrested and examined, with a view to his being surrendered to the United States Government, under the 10th article of the treaty of Washington.

The undersigned has the honor to acquaint Mr. Everett, in reply, that he lost no time in communicating Mr. Everett's application to the Secretary of State for the Home Department, who has informed the undersigned that, in the opinion of the law officers of the Crown, to whom Sir James

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Graham referred the papers, for the purpose of having a warrant prepared by them for his signature, the facts stated in the deposition which accompanied Mr. Everett's note do not constitute either of the crimes mentioned in the act of the last session of Parliament, (6 and 7 Vict., c. 76,) which was passed for giving effect to the 10th article of the treaty of Washington; and that Sir James Graham, as Secretary of State, has no authority to issue his warrant in this case.

Under similar circumstances, if they were to occur in this country, the English Government would be precluded, according to the view of the case taken by the law officers, from obtaining the interposition of the American Government for the apprehension of the person so charged, if he should escape from this country to America.

The undersigned has to express his regret, therefore, that Mr. Everett's request cannot be complied with.

The undersigned has the honor to renew to Mr. Everett the assurances of his high consideration.

ABERDEEN.

EDWARD EVERETT, Esq., &c.

Mr. Upshur to Mr. Everett.—[EXTRACT.]

DEPARTMENT OF STATE,

Washington, November 14, 1843.

With regard to the British act of Parliament to carry into effect the treaty of Washington, you will take the necessary steps to obtain through Lord Aberdeen the opinion of the law officers of the Crown as to the construction which is to be placed upon that act; and if, in their opinion, the construction which was placed upon it in the case of Clinton be incorrect, and if, in other respects, the case be a suitable one for it, you may renew your application for his surrender.

Mr. Upshur to Mr. Everett.—[EXTRACT.]

DEPARTMENT OF STATE,

Washington, November 23, 1843.

The reason assigned by the British Government for its declining to issue a warrant for the arrest of Andrew Pollock appears to be just, and is received as satisfactory.

Mr. Everett to Mr. Upshur.—[EXTRACT.]

LONDON, December 2, 1843.

I received, at a late hour on the 2d instant, (Saturday,) a note from the Foreign Office, transmitting a letter from the Home Department to Mr.

Addington, Under Secretary of State for Foreign Affairs, accompanied with an opinion of the Attorney and Solicitor General, on the construction of the act to carry into effect the tenth article of the treaty of Washington, relative to the extradition of fugitives. I have barely had time to read it; but I understand it to hold that the originals of affidavits may be received here as competent evidence to authorize the surrender of fugitives demanded by the United States. The contrary doctrine was held by the Bow street magistrate before whom Clinton, *alias* Reed, was brought up, and on that ground he escaped. The opinion, however, seems to take for granted that there must be, as a matter of course, a warrant granted by an American magistrate; but this point is assumed, not discussed. It is not possible, owing to the press of business in this office to-day, to have these papers copied for transmission with this despatch; and this I the less regret, as there appears to be a clerical error in one of them of some importance, which it is desirable to have corrected, if possible, before they are forwarded to America. * * * * *

Mr. Everett to Mr. Upshur.—[EXTRACT.]

LONDON, January 2, 1844.

* * * * *

In my despatch No. 68 I alluded to a note, which I had received from Lord Aberdeen, of the 2d of December, transmitting an opinion of the attorney and solicitor general upon a case, submitted to them by the Bow street magistrate, relative to the construction of the 10th article of the treaty of Washington, by which provision is made for the extradition of fugitives from justice. I forward this note, with the opinion accompanying it, with this despatch. The case submitted to the attorney and solicitor general was so drawn up as not to call their attention specifically to the ground on which the magistrate had proceeded, in refusing to order the arrest of Clinton, with a view to his extradition. But the opinion of the law officers seems to establish the insufficiency of that ground, viz: that original affidavits could not be received in evidence. It requires, however, a mode of authentication which had not been observed in reference to the affidavit on which the application in the present case was founded.

By the steamer of the 1st of December, I received from Mr. J. R. Whiting, district attorney for the city and county of New York, an exemplified copy of an indictment against Clinton, with a bench warrant for his arrest, to be used in support of a renewed application for his surrender. You direct me, in your despatch No. 67, to be governed by circumstances as to making another application, and I am requested by the agent of the parties in interest in New York to confer with Messrs. Bush & Mullens, the solicitors intrusted with the management of the business in this country. They incline to think that an application, founded on the copy of the indictment and bench warrant, would not succeed, under the opinion of the attorney and solicitor general, and have submitted a case on that point to counsel learned in the law. I have been awaiting the result, in order to assist me in making up my mind as to the course best to be pursued. * * * * *

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As soon as I can possess myself of the merits of the case, in its various bearings, I shall address Lord Aberdeen a note on the subject. Whatever the final result as to the extradition of Clinton may be, I think it is plain already that the act of 6 and 7 Vict., c. 76, passed with the intent to carry into effect the 10th article of the treaty of Washington, attaches conditions to the surrender of the fugitives not provided by the treaty itself, and has thus far, in one very strong case, defeated its operation.

[ENCLOSURE.]

FOREIGN OFFICE, *December 2, 1843.*

On the 14th ultimo, the undersigned, Her Britannic Majesty's Principal Secretary of State for Foreign Affairs, had the honor to transmit to Mr. Everett, envoy extraordinary and minister plenipotentiary of the United States of America at this Court, an account of the circumstances which led to the discharge from custody of an individual, named Nathaniel Britton, *alias* Clinton, charged with forgery in the United States, and for whose surrender to the American Government application had been made by Mr. Everett.

With reference to the same case, the undersigned has now the honor to lay before Mr. Everett the copy of a letter which the undersigned has received from the Home Department, covering a copy of a case, which, by the directions of the Secretary of State for that department, has been submitted to the attorney and solicitor general, for their opinion respecting the construction of certain provisions of the act 6 and 7 Vict., c. 76, for giving effect to the 10th article of the treaty concluded at Washington on the 9th of August, 1842, between Her Majesty and the United States of America.

The undersigned, in transmitting to Mr. Everett this document, containing the opinion required, avails himself of this opportunity to express his hope that that opinion, in clearing away any doubts which may have arisen as to the quality and extent of the powers possessed by the magistracy of Great Britain for the apprehension of offenders claimed on the part of the United States under the treaty of Washington, will contribute to facilitate the execution of that treaty on the part of Great Britain, and thereby to fulfil the wishes and intentions of Her Majesty's Government.

The undersigned requests Mr. Everett to accept the assurances of his high consideration.

ABERDEEN.

[ENCLOSURE.]

WHITEHALL, *November 27, 1843.*

SIR : I am directed by Secretary Sir James Graham to transmit to you the enclosed copy of a case which has been laid before the attorney and solicitor general, with their opinion thereon, respecting the construction of certain provisions of the act 6 and 7 Vict., c. 76, for giving effect to a

treaty between Her Majesty and the United States of America, for the apprehension of certain offenders; and I am to request that you will submit the same to the Earl of Aberdeen, for his lordship's information.

I am, &c.

J. M. PHILLIPS.

H. U. ADDINGTON, Esq., &c.

[ENCLOSURE.]

Case respecting the construction of certain provisions of the act of 6 and 7, Vict., c. 76, for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders.

[Copy of the act is left herewith.]

Secretary Sir James Graham has been pleased to transmit to the Solicitor of the Treasury a letter from Mr. Hall, chief magistrate of police, of which the following is a copy, with directions to submit the same to the attorney and solicitor general:

POLICE COURT, BOW STREET, October 18, 1843.

SIR: A person of the name of Nathaniel Britton was recently apprehended and brought before my colleague, Mr. Jardine, at this court, upon a charge of forgery in the United States, in order to be dealt with pursuant to the 6th and 7th Vict., c. 76, passed in the last session of Parliament, "for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders."

The accused, through the mistake of some one acting in behalf of the Government of the United States, had been improperly apprehended, no warrant having been previously required from or issued by a magistrate in this country, and he was not detained by Mr. Jardine, who thought the evidence tendered to him inadmissible in law.

The metropolitan police magistrates, and also justices of the peace throughout England, will, no doubt, frequently be required to give effect to this act, and it is very important that their decisions regarding its construction should not be conflicting. I beg to submit that the opinion of the law officers of the Crown should be taken upon the following points, on which doubts have arisen in the minds of some of the police magistrates and justices of the peace:

1st. To enable a magistrate to issue his warrant under the act, should it not appear that the offence charged against the party sought to be apprehended *here*, is also an offence against the laws of this country?—the words in the concluding part of the first clause of the act being: "and upon such evidence as, according to the laws of that part of Her Majesty's dominions, would justify the apprehension and committal for trial of the person so accused, if the crime of which he or she shall be so accused had been there committed."

2d. Are *original* depositions admissible, as well as copies thereof, under the second section of the act, the said act being a *penal* one?

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3d. If *original* depositions be admissible, should it not be certified, under the hand of the person who issued the warrant in America, that upon such depositions he granted his warrant?

4th. If copies are alone receivable, is it imperative on a magistrate to require the certificate of the judge or magistrate who granted the warrant in America, that they are copies of the depositions *upon which he issued his warrant*, and should they be also attested upon the oath of the party producing them, that they are correct copies of the originals?

5th. Is the "original warrant," mentioned in the second clause, to be taken to mean "the warrant issued by the judge or magistrate in America," and must such original warrant be produced before a magistrate in America, that he has issued, upon such depositions, his warrant, be sufficient? (In the act for carrying out the convention between Her Majesty and the King of the French, the original warrant of arrest is required to be produced.)

6th. Should a magistrate in England, upon having admissible depositions before him, require evidence that the offence charged is an offence against the law of America, or is he bound, under the words received in evidence of the criminality of the person so apprehended, "to act upon the depositions as proof that the facts therein set forth do constitute an offence according to that law?"

7th. Do the words "so apprehended," in the second section, exclude the reception of copies of depositions *before* the apprehension of the accused, under the warrant of a magistrate, or may those words be read "so to be apprehended?"

The Legislature can scarcely be supposed to have meant that a magistrate should not act upon depositions until the accused shall have been actually apprehended under his warrant.

Under the act for giving effect to the convention with France, the word used in the second section is "apprehended."

THOMAS S. HALL.

The attorney and solicitor general will be pleased to advise upon the several points stated in Mr. Hall's letter.

1st. The offences for which a party may be apprehended under this act are distinctly specified in the first section of it. They are all offences known and recognised by the criminal law of this country, and the magistrate should issue his warrant upon the same description of evidence as he would require in case the crime had been alleged to be committed in this country.

2d. We are of opinion that papers or documents professing to be or proved to be the original depositions are not admissible under the second section of the act, without the certificate of the magistrate who issued the warrant.

3d. We think they ought to be connected with the warrant, as copies ought to be, by a certificate from the party issuing it.

4th. We think copies are not admissible unless *certified* to be so under the hand of the person issuing the warrant, and *attested*, by the oath of the party producing them, that they are true copies.

5th. There can be no doubt that the words "original warrant," in the second section, mean the warrant issued in America; but, in order to justify the apprehension of an offender under this act, it does not appear to us

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to be necessary that any warrant, by the authorities in America, should be produced here; such production is not required by the first section of the act, which gives the justices here the power to apprehend. The second section applies merely to the evidence of the guilt; and if the depositions are offered in evidence before a magistrate here, then the certificate of the magistrate abroad, who took the depositions and issued his warrant upon them, becomes necessary to render them admissible.

6th. We think a magistrate may act upon the depositions, &c., if they would constitute an offence here, without proof that the offence charged is an offence in the foreign country.

7th. We think that the depositions may be received in evidence before the apprehension of the party.

FREDERICK POLLOCK.
W. W. FOLETT.

TEMPLE, *November 24, 1843.*

